In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1538

JOHN BLANK, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is under indictment in the United States District Court for the Northern District of Ohio, charged with three counts of having participated with others in conducting an illegal sports and horse-book betting business, in violation of 18 U.S.C. 1955, and with having conspired to commit the substantive offenses. Just prior to the return of the indictment, F.B.I. agents, on June 3, 1971, executed an admittedly valid search warrant, seizing from the described premises wagering records, including sheets showing the names of bettors and the amount of money owed or

owing on a daily basis, and other sheets showing the overall profits and losses of the business.

On August 3, 1971, petitioner filed in the district court a motion to suppress the items seized on the ground that the material "may be [in] his handwriting, is 'testimonial,' and potentially self-incriminating and thus not subject to seizure" (Pet. 5–6) under the Fifth Amendment. The district judge (Pet. App. 9–15; 330 F. Supp 783) granted the motion, relying on *Hill* v. *Philpott*, 445 F. 2d 144 (C.A. 7), certiorari denied, 404 U.S. 991. The government appealed under 18 U.S.C. 3731, and the court of appeals reversed (Pet. App. 16–24).

Petitioner contends that certiorari should be granted because the holding of the Sixth Circuit is in direct conflict with the Seventh Circuit's decision in *Philpott*. In *Philpott*, however, the items seized pursuant to a valid search warrant were tax records and other private papers of a doctor who was suspected of tax evasion. A divided panel of the Seventh Circuit held that the seizure was inconsistent with the Fifth Amendment privilege against self-incrimination. Viewing *Warden* v. *Hayden*, 387 U.S. 294, and other decisions of this Court[1] as implying that there is a special category of "testimonial" or "communicative" evidence, the very nature of which renders a seizure thereof inconsistent with the right to remain silent under the Fifth Amendment, the majority in *Philpott*

[1] The court in *Philpott* also relied on *Schmerber* v. *California*, 384 U.S. 757, and *Gouled* v. *United States*, 255 U.S. 298; and it referred to dicta in *Boyd* v. *United States*, 116 U.S. 616.

concluded that the doctor's "private" set of tax records fell within that category.

Whatever special protection might properly be invoked under the Fifth Amendment with respect to an otherwise permissible seizure of a physician's private tax records—a question which is, we think, not without difficulty—it does not follow that the business records of an illegal gambling operation are entitled to similar protection. Such records contain no information of a distinctly private nature; the personal thoughts and opinions of an individual are not involved; indeed, the papers contain little more than a running account of amounts owed by or owing to persons engaged in illicit gambling activities.[2] As this Court stated in a related context in *Stanford* v. *Texas*, 379 U.S. 476, 485 n. 16: "A 'book' which is no more than a ledger of an unlawful enterprise * * * might stand on a quite different constitutional footing from the books * * * [that reflect thoughts, opinions, beliefs, or mere predilictions of their possessors]."

The courts of appeals have consistently held that the seizure of records of an illegal business such as gambling does not infringe the self-incrimination clause of the Fifth Amendment. See, *e.g.*, *United States* v. *Hanon*, 428 F. 2d 101, 106–107 (C.A. 8) (*en banc*), certiorari denied, 402 U.S. 952; *United States* v. *Clancy*, 276 F. 2d 617, 629–631 (C.A. 7), reversed on other grounds, 365 U.S. 312; see also *United States*

[2] The fact that the records "may be" in petitioner's handwriting is of no significance for Fifth Amendment purposes. See *Schmerber* v. *California*, 384 U.S. 757, 763–764.